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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 19

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner

vs.

R. H. BOULIGNY, INC.,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an unincorporated association with members who are citizens of the state in which an action is instituted, and in which the plaintiff is incorporated, may remove such action to the United States District Court on the basis of its allegations that it is a labor organization and a citizen of another state?

2. May an unincorporated association, whether a juridical person or not, acquire the status of a citizen within the meaning of Article III, Section 2 of the United States Constitution, and 28 U.S.C. Sec. 1332 (a) (1), solely by reason of having a principal place of business in a state?

STATEMENT OF THE CASE

This case is one of two companion cases filed at the same time in the state court and removed by petitioner, United Steelworkers of America ("the Union") to the United States District Court. The other case is White v. United Steelworkers of America, cited at page 10 of the Union's Petition. Respondent R. H. Bouligny, Inc. ("Bouligny") in its complaint stated a cause of action for libel, alleging that the Union had falsely accused it of certain scandalous conduct in a widely circulated Union newspaper. White, the plaintiff in the companion case, in his complaint stated a cause of action for libel, alleging that the Union published in the same Union newspaper a defamatory and suggestive cartoon caricature picturing him in the bowl of a commode. The plaintiff White, an employee of Bouligny, and the Union consented to an order of the District Court that the jurisdictional disposition of the White case would abide by the decision in this case.

The Union offered no affidavits or other evidence in the District Court to prove its assertions that it is a juridical person and a citizen of the State of Pennsylvania. No evidence was offered as to how the Union is organized and how it operates.

The Union claims to be a citizen of Pennsylvania, but does not claim its status as a citizen and a sep-

arate legal personality pursuant to any law of the State of Pennsylvania, nor does it claim a formal organization in that State. The sole basis for the Steelworkers' contention that it is a citizen of Pennsylvania is that its principal place of business is located there. The Union contends that certain acts of Congress have conferred upon it a separate legal personality but does not contend that any law has conferred upon it a citizenship in the State of Pennsylvania. The Union has not claimed or proven that any of its members are citizens of Pennsylvania. Bouligny introduced proof that the Union has many members who are citizens of North Carolina (R. App. 9),[1] which has not been rebutted by the Union.

GROUNDS FOR DENYING THE WRIT

"That a limited partnership association created under the Pennsylvania statutes may be described as a 'quasi corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended." *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449 (1900).

1. The decision of the Court below is wholly in accord with the applicable decisions of this Court.

This Court has firmly established the rule that unincorporated associations are neither juridical persons nor citizens for purposes of diversity jurisdiction. *Thomas v. Ohio State University Board of Trustees*,

[1]For simplicity this brief adopts the reference symbols explained in footnote 1 of the Union's Petition at page 3 of that Petition.

195 U. S. 207 (1904); *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449 (1900); *Chapman v. Barney*, 129 U. S. 677 (1889); *Lafayette Ins. Co. v. French*, 59 U. S. 404 (1856).

The association considered in *Great Southern Fireproof Hotel Co.* was held by this Court not to be a citizen of Pennsylvania. It was created under an act of the General Assembly of Pennsylvania authorizing the formation of associations in which the capital subscribed alone would be responsible for the debts of the association. The act provided that the association was a citizen of the State of Pennsylvania. This Court disagreed with the holding in *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 F. 585 (6th Cir. 1898), that an association formed under the Pennsylvania statute was a citizen of Pennsylvania for the purposes of diversity jurisdiction. It appears from the Andrews Bros. Co. opinion of the Sixth Circuit Court, that, in addition to the foregoing, the association, pursuant to the act, was: (1) governed by a board of managers, (2) empowered to sue and to be sued in the association's name, (3) authorized to hold and convey real estate in its own name, (4) authorized to distribute profits by means of dividends, provided such dividends did not impair capital; and (5) that the interests of the members were freely transferrable or assignable, though the assignee could not participate in the affairs of the association until elected to membership. The Union in this case has not demonstrated that it has characteristics of a juridical entity equal to those which this Court has already held to be insufficient for the purpose of establishing an association as a citizen for diversity purposes.

The position of the Union in this case is not supported by *People of Puerto Rico v. Russell & Co.*, 288 U. S. 476 (1933). This Court was careful to distinguish the "Sociedad en comandita," created under the Code of Puerto Rico, involved there, from associations created in the United States:

> "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra. The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call the Sociedad en comandita a limited partnership in common-law sense, as the respondent and others have done, is to invoke a false analogy. In the law of its creation, the Sociedad is consistently regarded as a juridical person."

The *Puerto Rico* opinion of this Court cited with approval the case of *Levering & Garrigues Co. v. Morrin*, 61 F. 2d 115 (2d Cir. 1933), aff'd, 289 U. S. 103 (1933) where the Second Circuit held that a labor union could not be a citizen even though it might be procedurally suable as a legal entity under the doctrine of *United Mineworkers v. Coronada Coal Co.*, 259 U. S. 344 (1922).

As pointed out in the opinion of the court below, *Puerto Rico* did not involve a construction of Article III of the United States Constitution or of 28 U.S.C. Sec. 1332. The petition to remove and the Court's decision were based upon Sections 41 and 42 of the Organic Act of Puerto Rico, now 48 U.S.C. Sections 863, 864 (1948), enacted pursuant to the authority of

Article IV, Section 3 of the United States Constitution. *Puero Rico*, therefore, did not hold that the Article III constitutional judicial power of the United States extended to the controversy between Puerto Rico and the Sociedad. The Sociedad was not held to be a citizen within the meaning of Article III.

The Union in its Petition for a Writ of Certiorari at pages 3 through 6 recites the District Court's "Finding of Fact" that the Union is a juridical person as completely as if organized as a corporation and contends that the Fourth Circuit did not disturb this "Finding of Fact." The Union introduced no evidence from which such a "fact" might have been found, but relied solely upon several acts of Congress imposing certain obligations upon labor unions and conferring certain immunities. The question then is not one of fact but one of law. The reversal by the Fourth Circuit amounts to a repudiation of this so-called finding of fact which is, in truth, not a finding of fact but a conclusion of law. The Union has failed to bring itself within the purview of the *Puerto Rico* decision upon the facts.

The petition in this case presents two questions. First, may the Union be a juridical person for the purpose of having the status of a citizen? In the above cited cases, this status was claimed on behalf of associations created pursuant to statute, and the citizenship was claimed to be in the state where the statute permitted the organization of the association. The Union in this case lacks a state of formal organization, and claims to be a citizen of the state where its principal place of business is located. This presents the second question, may the Union, whether a jurid-

ical person or not, be a citizen of a state solely because its principal place of business is located there?

The decisions of this Court afford a clear negative answer to that question. This Court has never held for the purpose of establishing diversity jurisdiction that any association might be a citizen of a state merely because its principal place of business is located therein. In *Bank of U. S. v. Deveaux*, 9 U. S. 37 (1809), Chief Justice Marshall characterized a corporation as ". . . a mere creature of the law, invisible, intangible and incorporeal" and not a citizen for diversity purposes. This Court in *Louisville C. & C. R.R. v. Letson*, 43 U. S. 497 (1844) held that "when the corporation exercises its powers in the State which chartered it, that is its residence. . ." and that the corporation is to be "deemed" a citizen of that state for purposes of diversity jurisdiction. In *Marshall v. Baltimore & Ohio R.R.*, 57 U. S. 314 (1853), this Court held that a corporation cannot be a citizen (a decision forced by the dissenters in the *Letson* case, according to the opinion below), notwithstanding that the same result as in *Letson* was brought about by a conclusive presumption that all stockholders are citizens of the chartering state. The issuance of a state charter is essential to citizenship by the reasoning in either case. An unincorporated association is not so easily deemed to be a citizen of the state in which is located its principal place of business, nor are its members so easily deemed to be citizens of that state. Article III of the United States Constitution would be stretched far beyond traditional judicial concepts in permitting an unincorporated association, not otherwise having the status of a citizen, to acquire that status for federal

jurisdictional purposes by establishing a principal place of business in a state.

Far from helping the Union, the 1958 amendment of 28 U.S.C. Section 1332 by the addition of Subsection (c) is not indicative of a policy favoring the view that a principal place of business within a state establishes citizenship in that state within the constitutional meaning. This subsection reads,

> "For the purposes of this Section, and Section 1441 of this Title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the State where it has its principal place of business."

The word "deemed" is not clear in its precise meaning as used in this subsection. The legislative history of this subsection given in Senate Report No. 1830 found in 1958 U. S. Code, Cong. & Adm. News, p. 3099 at page 3101, says:

> "It is now established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen of the State in which it is incorporated (St. L. & S. F. Ry. Co. v. James, 161 U. S. 545, 16 S. Ct. 621, 40 L.Ed. 802 (1896)."

However, this Court in the *James* case did not revert to the doctrine of the *Letson* case, but plainly restated the doctrine that a corporation is presumed to be composed of citizens of the state which created it. The word "deemed" in 28 U.S.C. Sec. 1332 (c) would therefore mean "deemed" by reason of this conclusive persumption. This Court in *James* declined to extend the meaning of "citizen" in order to adopt the doctrine urged therein that a corporation domesticated in an-

other state "shall be deemed to be composed of citizens of the second state. . . ." There is nothing in *James* which would support the quoted part of the statute as an extension of federal diversity jurisdiction. All the stockholders of a corporation could not at once be presumed citizens of the incorporating state and also citizens of the state of the principal place of business. The provision of the statute that a corporation is deemed a citizen of the state of its principal place of business is not a creation of a new citizenship, but a limitation upon existing federal diversity jurisdiction accomplished by the use of paradoxical terms in the statute. This statutory purpose is the opposite of the Union's purpose. The traditional doctrine that a corporation is a citizen of the chartering state by reason of a presumption that all stockholders are citizens of that state would be inconsistent with any presumption that stockholders and association members might be citizens of the state of the principal place of business.

2. The decision of the court below does not depart from the traditional federal diversity jurisdiction rule ordinarily applied by the circuit courts, and there is consequently no need for review by this Court. See *Calagaz v. Calhoon,* 309 F. 2d 248 (5th Cir. 1962) (labor union); *Hanson v. Chicago B. & Q. R. Co.,* 282 F. 2d 758 (7th Cir. 1960) cert. denied, 365 U. S. 850 (1961) (labor union); *Brocki v. American Express Co.,* 279 F. 2d 785 (6th Cir. 1960); *Arbuthnot v. State Automobile Ins. Assn.,* 264 F. 2d 260 (10th Cir. 1959); *Lowry v. International Brotherhood of Boiler Makers, Iron Ship Builders & Helpers of America,* 259 F. 2d 568 (5th Cir. 1958) (labor union); *Underwood v. Malony,* 256 F. 2d 334 (3d Cir. 1958) cert. denied, 358

U. S. 864 (1958) (labor union); *Swan v. First Church of Christ, Scientist, in Boston*, 225 F. 2d 745 (9th Cir. 1955); *Hettenbaugh v. Airline Pilots Assn. Internatl.*, 189 F. 2d 319 (5th Cir. 1951) (labor union); *Steele v. Guaranty Trust Co. of N. Y.*, 164 F. 2d 387 (2d Cir. 1947) cert. denied, 33 U. S. 843 (1948); *Tunstall v. Brotherhood of Locomotive F. and E.*, 148 F. 2d 403 (4th Cir. 1945); *Wise v. Brotherhood of Locomotive Firemen*, 252 F. 961 (8th Cir. 1918) (labor union).

Mason v. American Express Co., 334 F. 2d 392 (2d Cir. 1964) is the only clean break with that tradition. The association involved there was a New York joint stock association, organized under a New York statute, and was apparently very similar to the one in *Andrews Bros. Co. v. Youngstown Coke Co., supra. Mason* is not in disagreement with the decision below upon the second issue, the association there having a formal organization under the statutes of New York. It cannot be said that the Second Circuit would have reached a different result in this case. The circuits therefore are not in conflict in a way which should give cause for a review on a writ of certiorari. Further, if there is a conflict with the traditional rule established by this Court, it was created by the Second Circuit and not the court below. There would consequently appear to be no cause for review of the decision below.

No case has been found prior to the *Mason* case which broke with tradition sharply enough so that it could be said with any degree of certainty that any such break had occurred. *American Federation of Musicians v. Stein*, 213 F. 2d 679 (6th Cir. 1954) cert. denied, 348 U. S. 673 (1954), was not such a break. The Court in that case held only that the dis-

trict court had jurisdiction to issue an injunction pending a determination of whether it had jurisdiction of the parties. In arriving at this holding, the Court indulged in speculation that the district court might need time to weigh the authorities and make a determination as to whether the diversity jurisdiction rule might be changing.

The opinion in *Van Sant v. American Express Co.*, 169 F. 2d 355 (3d Cir. 1947) is as much subject to the construction that it holds that the objection to diversity jurisdiction was made too late for the first time on rehearing of the appeal as it is to the interpretation that the joint stock association created under the statutes of New York is a citizen. The Court says at page 372:

> "The point involved, in our view, is not under the rule of Chapman v. Barney. . . ."

The Court in Footnote 7 on the same page seems to recognize the continuing validity of the *Chapman* rule, and the Court does not appear to think that it is departing from that rule. In *Swan v. First Church of Christ, Scientist, in Boston*, 225 F. 2d 745 (9th Cir. 1955), the only question was whether the church was a corporation or not. The Ninth Circuit apparently had no doubts that the church was not a citizen if it was not a corporation.

Stein, *Van Sant*, and *Swan*, like *Mason*, contained no intimation that those courts might achieve a result different from that in the court below upon the second question. There is no indication that any circuit might decide this case differently. No case has been found in which the court indicates that it might entertain the idea that an association, not organized pur-

suant to any statute, could be a citizen. There is, therefore, upon the facts of this case, no conflict in the circuits which ought to be cause for review.

3. There are compelling reasons of policy for not disturbing the decision below.

The American Law Institute has undertaken a study of the division of jurisdiction between state and federal courts and has published two tentative drafts. Diversity jurisdiction as applied to unincorporated associations is a part of the study. See Tentative Draft No. 2, Section 1301 (b) (2) (1964). This effort may result in useful legislation in the area of diversity jurisdiction as it pertains to unincorporated associations. Consequently, a review by this Court at this time would be premature.

The main current of legal thought from the time of the decision in *Great Southern Fireproof Hotel Co. v. Jones, supra,* until the present time has been that it is unwise to expand federal diversity jurisdiction by including unincorporated associations as citizens. The limitation of federal diversity jurisdiction rather than the expansion of it has been considered wise policy. In the American Law Institute's study of the division of jurisdiction between state and federal courts, Tentative Draft No. 1 (1963) the general statement on diversity jurisdiction appearing at page 36 is as follows:

"There should be stated at the outset the firm premise of the Reporters that access to the federal courts because of the diversity of citizenship of the parties should be permitted only upon a showing of strong reasons therefor and only to the extent that these reasons justify. This premise is grounded up-

on the political axiom, advanced by Hamilton in Justification of the Federal Judicial Power, that judicial and legislative authority should be co-extensive. So long as federal courts continue to decide cases arising under state law without the possibility of state review, the state's judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy. It would be preferable to see the use of the federal courts concentrated upon the adjudication of rights created by federal substantive law. In such adjudication the federal courts speak with the authority which they lack in diversity cases since Erie R.R. v. Thompkins, 304 U. S. 64 (1938), and can thus exercise the creative function which is essential to their dignity and prestige."

The history and development of federal diversity jurisdiction is reviewed in Friendly, Historic Basis of Diversity Jurisdiction (1928), 41 Harv. L. Rev. 483, and at page 510 this sound conclusion is presented:

"The steady expansion of the jurisdiction of the federal courts, especially since reconstruction days, has been but a reflex of the general growth of federal political power. That growth will not abate, since it is responsive to deep social and economic causes. Only one aspect of the work of the federal courts is out of the current of these nationalizing forces — the jurisdiction based on diversity of citizenship. This had its origin in fears of local hostilities, which had only a speculative existence in 1789, and are still less real today. The unifying tendencies of America here make for a recession of jurisdiction to the state, rather than an extension of federal authority. The pressure of distinctively

federal litigation may call for relief of business that intrinsically belongs to the state courts. How far, if at all, the United States courts should be left with jurisdiction merely because the parties are citizens of different states is a question which calls for critical re-examination of the practical bases of diversity jurisdiction."

This sound policy of restricting diversity jurisdiction was followed by Congress in 1958 when the present subsection (c) was made a part of 28 U.S.C. Section 1332. Now that Congress has undertaken to legislate specifically as to corporations, the contention that unincorporated associations may be citizens within the meaning of 28 U.S.C. Section 1332 is less tenable.

The author of a note, 38 Harvard L. Rev. 510 (1925), wisely suggests that since the heat of conflict occasionally surrounding labor unions is generated by friction between different strata of society, rather than by different geographic regions, that type of controversy is better left in the state courts.

There are difficulties attendant upon granting diversity jurisdiction to unincorporated associations because they have characteristics of an entity which are not present in the case of corporations. The corporate form of organization is well defined and universally recognizable, all being treated alike for diversity jurisdiction purposes; but associations can and do exist with an infinite variety of shades and combinations of corporate characteristics. If the concept of a citizen were expanded to include some unincorporated associations by reason of their characteristics as entities, each case would have to stand on its own bottom in its claim to citizenship, with attendant uncertainty

and increased burden of litigation in the federal courts. The result would be a great many additional cases being removed to or filed in the federal courts, both where there is or where there is not determined to be federal jurisdiction. In each one of these cases, the Court would have to determine whether the association has sufficient characteristics of an entity to be a citizen. This situation would result in unnecessary and wasteful increased cost of operation of the federal courts due to the increased work load, in the federal courts being distracted from more important questions, and in the increased cost of litigation, wasted time and harassment to litigants. Unincorporated associations' status as a citizen for diversity jurisdiction would be better granted by legislation rather than judicial decree, if granted at all, since a court decision could only leave many vexing questions unanswered, whereas legislation could provide comprehensive outlines for all cases.

CONCLUSION

For the reasons set forth hereinabove, the petition should be denied.

Respectfully submitted,

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